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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. A1–A16) is reported at 246 F. 2d 357. The opinion of the District Court is reported in 134 F. Supp. 898, 917–950.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1957 (Pet. A17). A timely petition for

[1] The portion of the District Court's opinion reported at 134 F. Supp. 898 to the beginning of the "Second Memorandum" on page 917 concerns its holding that the Government was entitled to judgment against the Westmoreland Manganese Corporation for the Government's principal claim and to foreclosure of its real estate and chattel mortgage and supplement thereto. That portion of the decision was affirmed (*Westmoreland Manganese Corporation* v. *United States*, 246 F. 2d 351 (C. A. 8), and no further review has been sought.

rehearing was denied on August 7, 1957. The petition for a writ of certiorari was filed September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens.

STATUTE INVOLVED

The pertinent portions of the Arkansas Miners' Lien Law, relied upon by the petitioners are set out in the petition (Pet. B4–B5).

STATEMENT

The Court of Appeals reversed the district court's determination that prior federal mortgage liens were not entitled to priority over subsequent state miners' liens, the district court having based its decision on Arkansas law rather than federal law as developed by this Court (Pet. A16). As noted by the Court of Appeals, the "complicated facts" (Pet. A2) are set out in detail by the district court in its opinion reported at 134 F. Supp. 898, 917. The essential facts may be summarized as follows:

This is a mortgage foreclosure action brought by the United States against the Westmoreland Manganese Corporation. Under the provisions of the Defense Production Act of 1950, 50 U. S. C., App. 2061 *et seq.*, the Government had advanced a total of over $2,877,081 to Westmoreland to assist in the construction and operation of a manganese ore washing and concentrating plant to be constructed

within a year by Westmoreland on its property (R. 22–24, 246, 250). As security for its advances the Government was to be given "unencumbered and unqualified mortgages" (R. 30) covering the new facilities and all mining properties then owned by Westmoreland, and the contract further provided (R. 30):

> (d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

Mortgage instruments, duly executed and recorded, mortgaged to the United States all the property of Westmoreland, then owned or thereafter acquired, whether such property be real, personal of mixed (R. 35–52, 162, 247). Among the provisions of the Real Estate and Chattel Mortgage are the following (R. 38, 44):

> This mortgage shall constitute a first lien on the mortgaged property.
>
> * * * * *
>
> That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof * * *.

The Supplemental Mortgage, which was described therein as being cumulative to the Real Estate and Chattel Mortgage (R. 52), provided in all-embracing

detailed description the various items covered by the mortgage (R. 48–49) and continued (R. 51):

IV

> It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

At the time of the recordation of the mortgage instruments, Westmoreland had no other debts, other than that owing to the United States, which could be the basis for an encumbrance of its property (R. 249).

Petitioners furnished goods or services to Westmoreland during the construction of its plant. "The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees [petitioners]" (Pet. A12). The Westmoreland project failed and the instant action ensued. Upon motion by the United States for the appointment of a receiver *pendente lite*, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said re-

ceiver take possession of all property of Westmoreland, whether real, personal or mixed (R. 164, 168–171). There was no appeal from that order. After trial, the district court adjudged that the United States was entitled to a money judgment and to foreclosure.[2]

While rejecting several contentions of the petitioners (R. 174–193), the district court was of the opinion that petitioners were entitled, by virtue of the Arkansas 'Miners' Lien Statute (Ark. Stats. (1947), sec. 51–701, *et seq.*, Pet. B4–B5) to priority over the Government's mortgage liens with respect to the partially completed building improvements and with respect to materials which had been furnished, but not actually used, in the construction of the new improvements (R. 174, 193, 204–205).[3] The district court considered the question "to be entirely one of Arkansas law" (R. 193). Westmoreland's property was sold for a total of $1,348,551.19, which was insufficient to satisfy the judgment in favor of the United States. Those items of property as to which petitioners were held to be entitled to priority were sold for a total of $319,489.79.

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[2] The district court's memorandum opinion on this phase of the case (134 F. Supp. 898, 904–917) has been affirmed. *Westmoreland Manganese Corp.* v. *United States*, 246 F. 2d 351 (C. A. 8).

[3] Inasmuch as petitioners had not furnished any materials for the new facilities until after recordation of the Government's mortgages, petitioners conceded and the district court held that the mortgage lien was paramount to the statutory liens with respect to the lands of Westmoreland and the improvements existing thereon at the time of recordation of the mortgages (R. 174–175, 205–206).

In its opinion on an appeal by the Government, the Court of Appeals reviewed the contract and mortgage provisions for unencumbered and unqualified mortgages to constitute a first lien on the mortgaged property (Pet. A4–A5). It then discussed the Government's contentions that federal law applied and that the Government's rights under its contract lawfully entered into cannot be affected or limited by provisions of state law; and the Government's further contention that under R. S. 3466, 31 U. S. C. 191 (*infra*, p. 9), it is entitled to priority in payment (Pet. A5–A6). The Court of Appeals went on to hold that at least to the extent of the issues raised by the pleadings it was bound to apply the appropriate law and that, under recent decisions of this Court, federal law controlled (Pet. A7–A8). It then concluded that because of the result reached in the determination of other issues it was unnecessary to determine whether the Government was entitled to priority under R. S. 3466 (Pet. A8–A9). The Court of Appeals held that under federal law the petitioners' miners' liens were inchoate and were not specific and perfected at the time the Government mortgages attached to the Westmoreland property so that the Government's mortgage liens are prior to the liens of the petitioners (Pet. A16). Accordingly, the Court of Appeals reversed the judgment of the district court (Pet. A16). A motion for rehearing by the petitioners was denied on August 7, 1957.

ARGUMENT

1. While growing out of a somewhat complicated factual situation, the single issue here presented—whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens—has been clearly resolved in favor of such priority, as shown by numerous decisions of this Court.

This case involves federal mortgages, and the liens created thereby, and the Court has made it clear beyond cavil that Government contracts "or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367; *United States* v. *Standard Oil Co.*, 332 U. S. 301, 308–310; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121–123. The Court of Appeals was obviously correct in holding that "The trial court erred in determining the priority issue before it on the basis of Arkansas law rather than upon the basis of federal common law as developed by the Supreme Court of the United States * * *" (Pet. A16).

Even if the mortgage liens of the United States had not been prior in time and so entitled to priority on that basis (*United States* v. *New Britain*, 347 U. S. 81, 85; *Rankin* v. *Scott*, 12 Wheat. 177, 179; *United States* v. *City of Greenville*, 118 F. 2d 963, 966 (C. A. 4); *Paul* v. *United States*, 127 F. 2d 64, 66 (C. A. 6), petitioners had done nothing under their state statutory liens to divest the property owner of either title

or possession. Thus, as pointed out by the Court of Appeals (Pet. A12–A15), recent decisions by this Court have made it clear that under federal law such liens as here created by state statute "are not specific and perfected but are merely caveats of a more perfect lien to come" (Pet. A13). *United States* v. *Waddill Co.*, 323 U. S. 353, 358–360; *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 365–366; *Spokane County* v. *United States*, 279 U. S. 80, 93–94; *Illinois* v. *Campbell*, 329 U. S. 362, 370–376.

In a series of cases this Court has recently awarded priority to the United States as against various types of nonfederal liens. *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, reversing 227 F. 2d 359 (C. A. 7), rehearing denied, 351 U. S. 958; *United States* v. *Colotta*, 350 U. S. 808; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47. In view of these recent pronouncements by this Court, it is clear that the Court of Appeals was sound in its conclusion that (Pet. A16):

> We are satisfied that under federal law the appellees' [petitioners'] miner's liens were inchoate and were not specific and perfected at the time the lien of the Government mortgages attached to the Westmoreland property. It is therefore our conclusion that the Government's mortgage lien is prior to the liens of the appellees.

2. While the Court of Appeals found it unnecessary to pass on the matter because of its determination of other issues (Pet. A8–A9), it should be noted that, even without regard to the special provisions of the contract and mortgages, the Government's debt should be first satisfied from the assets of Westmoreland. By Section 5 of the Act of March 3, 1797, 1 Stat. 512, 515, as amended, R. S. 3466, 31 U. S. C. 191, Congress has declared:

> Whenever any person indebted to the United States is insolvent * * *, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

By virtue of this federal statute, the claim of the United States is entitled to priority in payment from the assets of Westmoreland.

Upon motion by the United States for the appointment of a receiver, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said receiver take possession of *all* the property of Westmoreland whether real, personal or mixed (R. 164, 168–171). Westmoreland, although free to do so (*Adler* v. *Seaman*, 266 Fed. 828, 840–841 (C. A. 8), appeal dismissed, 254 U. S. 621; *Garden Homes* v. *United States*, 200 F. 2d 299, 300

(C. A. 1)), did not appeal from that order.[4] Under these circumstances it is plain that the priority statute (31 U. S. C. 191) is applicable. See, *e. g.*, *Illinois* v. *Campbell*, 329 U. S. 362, 369–370, where this Court noted the necessity of recognizing the "realities" and went on expressly to state that "in any event the record demonstrates that the debtor was insolvent at the time of the appointment of the receiver, for when its property was liquidated there was not enough to satisfy the claims of the two contesting creditors at the bar." This statement is fully applicable to the instant case. See also, *United States* v. *Texas*, 314 U. S. 480, 483–484; *United States* v. *Emory*, 314 U. S. 423, 426; *United States* v. *Butterworth Corp.*, 269 U. S. 504, 513–514.

3. Other arguments advanced by the petitioners are equally without merit.

(A) Even if there were not in fact a federal statutory lien favoring the Government in this case (*supra*, pp. 9–10; cf. Pet. 10–12), there is no need for further review by this Court with respect to state statutory liens *vis-a-vis* prior federal liens. As shown, *supra*, pp. 7–8, this Court has recently and repeatedly handed down decisions or bare rulings consistently upholding the priority of the federal liens.

(B) There is no conflict with *United States* v. *Ansonia Brass Etc. Co.*, 218 U. S. 452. (Cf. Pet. 12–13.) Indeed, analysis of that case supports the ruling of

[4] Indeed, in its Motion to Stay Order for Sale filed in the Court of Appeals on or about January 21, 1956, Westmoreland stated that it was "not financially able to supersede the decree of foreclosure entered herein, *all its property and assets being in the hands of the receiver*." (Emphasis added.)

the Court of Appeals in the instant case.[5] In this connection, it should be noted that petitioners' quotation (Pet. 13) from a letter from special counsel for the Government, Harry E. Meek, Esq., is grossly misleading. Prior to the excerpt appearing in the petition (p. 13), Mr. Meek had stated flatly (Supp. R. 11–12): "Under our Arkansas Statute where a mortgage is given to secure a loan to finance the construction of an improvement, *the mortgage takes priority over any statutory liens created in connection with the construction of such improvement* [citation

[5] In the *Ansonia* case, as to the contract for the construction of the dredge Berryiiard [which provided that the Government should make partial payments to the contractor at various stages in the construction of the vessel and that "The parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States" (218 U. S. at pp. 466–467)], this Court held that the contractor's title had been divested during the process of construction and that laborers and materialmen could no longer assert the liens created by State law (218 U. S. at pp. 467–472; *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 32). This holding has been followed in several cases. *In re Read-York*, 152 F. 2d 313, 316 (C. A. 7); *In re American Boiler Works*, 220 F. 2d 319 (C. A. 3); *Thompson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913, 914–915 (N. D. Cal.).

The *Ansonia* case also involved two other shipbuilding contracts for the revenue cutter Mohawk and the cruiser Galveston. This Court held that local liens for labor and materials had priority for lack of expressed intent that the federal liens should be superior. But as spelled out *infra*, pp. 12–13, in the instant case the intention of the Government could hardly be plainer that its lien was to be paramount to all other liens upon all the assets (R. 30, 38), even to the extent of specifically providing that the Government's lien "will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien" (R. 51).

omitted]." (Emphasis added.) He then goes on to make clear that out of an abundance of caution—so as not "to rely 100% on this statute" (Supp. R. 12)—he is suggesting the advisability of certain precautions, using the language quoted by the petitioners.

Although the petition (p. 13) alleges that "* * * it is clear that the Government did not provide for a lien that would be superior to the lien of the Petitioners * * *", it is submitted that the Government's priority could not be stated with any greater clarity. Thus, as security for the Government's advances, the contract with Westmoreland provided that the Government was to be furnished "with *unencumbered* and *unqualified* mortgages covering the new facilities" as well as all mining properties then owned by Westmoreland, and that "*The Government shall have a lien paramount to all other liens* upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and *upon all other assets*" (R. 30). With respect to the priority of the Government's lien, the Real Estate and Chattel Mortgage expressly recited that it constituted "*a first lien on the mortgaged property*" (R. 38) and, as noted *supra*, p. 4, the Supplemental Mortgage provided (R. 51) that "it is understood * * * that the lien of the Mortgagee * * * *will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.*" (Emphasis added.)

(C) Contrary to petitioners' contention (Pet. 13–15), the case of *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, is completely irrelevant here. The Government's lien, attaching at the time of transfer

of title, was prior in time to the liens of petitioners as to each item of material furnished for the Westmoreland project. Thus, when title to the various materials became vested in Westmoreland they were not burdened with mechanics' or materialmen's liens, and reliance by petitioners, and the district court (R. 214), upon such authorities as *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 19–24, is clearly misplaced. In the *Bear Lake* case the work giving rise to the mechanics' liens was performed prior to the time at which the mortgagor could have acquired title.

Nor does petitioners' reference to the "equitable issues" (Pet. 14) have merit. As the Court of Appeals took occasion to point out (Pet. A12):

> The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees [petitioners]. Consequently, at the time appellees entered into contracts with Westmoreland for labor and materials, they had constructive notice of the terms of the Government's mortgages. This fact may not be of any particular significance in the determination of this case, but it is an answer to the equitable claims of the appellees.[6]
> * * * *

The Court of Appeals went on to say (Pet. A12):

> The validity of the Government's mortgages in all respects has been confirmed by the judg-

[6] Moreover, the petitioners could readily have protected themselves by the exercise of normal business precautions. Particularly in dealing with a new company which was doing business largely on borrowed funds, petitioners might well have utilized conditional sales contracts or have required a bond of Westmoreland.

ment that has been entered. The Government, by virtue of a valid contract, authorized by the Constitution and statutes of the United States, bargained for and obtained a paramount lien upon Westmoreland's property. We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by statute.

(D) Entirely without merit is the attempt (Pet. 15–18) to invoke the "rules of decision" section of the United States Code (28 U. S. C. 1652). As has been shown (*supra*, p. 7), this Court has repeatedly made it clear that Government contracts "or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183. Thus, rather than the Court of Appeals having "overlooked" the provisions of 28 U. S. C. 1652 as indicated in the petition (p. 15), that court was simply recognizing the law as repeatedly laid down by this Court (see cases cited *supra*, pp. 7–8).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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